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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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STATE OF HAWAII, Plaintiff-Appellee, v.
REVELATION ALO, Defendant-Appellant

NO. 24154

ORDER OF TEMPORARY REMAND
TO THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Cr. No. 00-1-0018)

MARCH 24, 2003

BURNS, C.J., WATANABE, AND LIM, JJ.

Per curiam. Defendant-Appellant Revelation Alo (Alo) appeals from the February 14, 2001 Judgment of the Circuit Court of the First Circuit (the circuit court), Judge Dan T. Kochi presiding, convicting Alo of committing two counts of Sexual Assault in the Third Degree, in violation of Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993),¹ and one count of

^{1/} Hawaii Revised Statutes (HRS) § 707-732(1)(b) (1993) provides:

Sexual assault in the third degree. (1) A person commits the offense of sexual assault in the third degree if:

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Unlawful Imprisonment in the Second Degree, in violation of HRS § 707-722 (1993).²

Alo argues on appeal that the circuit court motions judge, Judge Michael Town, wrongly applied the victim-counselor privilege set forth in Hawaii Rules of Evidence (HRE), Rule 505.5(b)³ to preclude disclosure to the defense of the

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- (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]

^{2/} HRS § 707-722 (1993) states, in relevant part:

Unlawful imprisonment in the second degree. (1) A person commits the offense of unlawful imprisonment in the second degree if the person knowingly restrains another person.

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- (4) Unlawful imprisonment in the second degree is a misdemeanor.

^{3/} Hawaii Rules of Evidence (HRE), Rule 505.5 (1993) provides, in relevant part, as follows:

Victim-counselor privilege. (a) Definitions. As used in this rule:

- (1) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the provision of counseling or treatment services to the victim or those reasonably necessary for the transmission of the communication.
- (2) "Domestic violence victims' program" means any refuge, shelter, office, safe home, institution, or center established for the purpose of offering assistance to victims of abuse through

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^{3/} (...continued)

crisis intervention, medical, legal, or support counseling.

- (3) "Sexual assault crisis center" means any office, institution, or center offering assistance to victims of sexual assault and the families of such victims through crisis intervention, medical, and legal, or support counseling.
- (4) "Social worker" means a person who has received a master's degree in social work from a school of social work accredited by the Council on Social Work Education.
- (5) A "victim" is a person who consults a victim counselor for assistance in overcoming any adverse emotional or psychological effect of sexual assault, domestic violence, or child abuse.
- (6) A "victim counseling program" is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services.
- (7) A "victim counselor" is either a sexual assault counselor or a domestic violence victims' counselor. A sexual assault counselor is a person who is employed by or is a volunteer in a sexual assault crisis center, has undergone a minimum of thirty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a social worker, nurse, psychiatrist, psychologist, or psychotherapist, and whose primary function is the rendering of advice, counseling or assistance to victims of sexual assault. A domestic violence victims' counselor is a person who is employed by or is a volunteer in a domestic violence victims' program, has undergone a minimum of twenty-five hours of training and who is, or who reports to and is under the direct control and supervision of, a direct service supervisor of a domestic violence victims' program, and whose primary function is

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complaining witness's communications to a private social worker during therapy sessions that followed the incident that gave rise to the charges against Alo. More specifically, Alo claims that the circuit court "abused its discretion in failing to conduct an *in camera* review of [records of the complaining witness's

^{3/} (...continued)

the rendering of advice, counseling, or assistance to victims of abuse.

(b) General rule of privilege. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim.

(c) Who may claim the privilege. The privilege may be claimed by the victim, the victim's guardian or conservator, or the personal representative of a deceased victim. The person who was the victim counselor at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the victim.

(d) Exceptions. There is no privilege under this rule:

- (1) Perjured testimony by victim. If the victim counselor reasonably believes that the victim has given perjured testimony and a party to the proceeding has made an offer of proof that perjury may have been committed.
- (2) Physical appearance and condition of victim. In matters of proof concerning the physical appearance and condition of the victim at the time of the alleged crime.
- (3) Breach of duty by victim counselor or victim counseling program. As to a communication relevant to an issue of breach of duty by the victim counselor or victim counseling program to the victim.

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sessions with the social worker] or in refusing to seal those records for appellate review." Alo does not contest that the social worker's records are privileged but argues that this privilege should not "'stand in the way' of due process considerations, his right to confrontation, effective assistance of counsel or right to compulsory process[.]"

It appears from the record on appeal that the circuit court refused to review *in camera* or seal for appeal the social worker's records because the court felt that the records were absolutely privileged. At the time the circuit court made this decision, it was not clear how Hawai'i courts should resolve a direct conflict between a criminal defendant's constitutional right to confrontation and a witness's invocation of a statutory privilege set out in the HRE.

On February 25, 2003, the Hawai'i Supreme Court issued its opinion in State v. Peseti, slip op. (No. 23345, Feb. 25, 2003) (Peseti). In Peseti, the defendant challenged the trial court's decision not to allow him to cross-examine the complaining witness or her victim counselor about a privileged conversation the complaining witness had with the counselor during which the complaining witness recanted her allegations of sexual abuse by the defendant. The supreme court vacated the defendant's conviction, holding that "when a statutory privilege

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interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' [sic] statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights." Id., slip op. at 16.

The supreme court set out a three-part test for trial courts to use in determining whether, in a particular case, the right to confrontation should override a statutory privilege:

Although it stands to reason that the right of confrontation via cross-examination, as guaranteed by article I, section 14 of the Hawai'i Constitution, will not trump a statutory privilege in every case in which a conflict arises between the two, we believe that fundamental fairness entitles a defendant to adduce evidence of a statutorily privileged confidential communication at trial when the defendant demonstrates that: "(1) there is a legitimate need to disclose the protected information; (2) the information is relevant and material to the issue before the court; and (3) the party seeking to pierce the privilege shows by a preponderance of the evidence that no less intrusive source for that information exists."

Id. at 18.

The supreme court also held, however, that the defendant was not entitled to unfettered access to the files or records containing the privileged communications. Relying on the United States Supreme Court's decision in Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the Hawai'i Supreme Court concluded that a defendant's due process interests can be appropriately protected if the trial judge conducts an *in camera* review of the complaining witness's privileged records and thereafter produces

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to defense counsel the portions of the records that are relevant to the defendant's defense.

In light of Peseti, we conclude that the circuit court erred when it decided that the complaining witness's victim-counselor privilege was absolute and, thereafter, refused to conduct an *in camera* review of the social worker's files to determine whether any relevant evidence existed in the files that might have exculpated Alo of the charges against him. Because the social worker's files were never sealed for appellate review, we are unable to independently determine whether Alo's due process rights were jeopardized in this case. Accordingly,

IT IS HEREBY ORDERED that:

(1) This case is temporarily remanded to the circuit court, with instructions that the circuit court shall, within seven (7) days from the date of this order, direct the complaining witness's social worker to submit to the circuit court a copy of the social worker's files regarding the complaining witness;

(2) The clerk of this court shall forthwith transmit to the circuit court the files previously docketed under this appeal;

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(3) The circuit court shall, upon receipt of a copy of the social worker's files, immediately seal such files for appellate review; and

(4) The clerk of the circuit court shall, within seven (7) days of the receipt and sealing of the social worker's files, supplement the record on appeal with the sealed social worker's files and certify and re-transmit the lower court record with the supplemental record on appeal to the clerk of the supreme court. For all other purposes, jurisdiction of this appeal is retained in this court.

Chief Judge

Associate Judge

Associate Judge